

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL BAILEY,
CDCR #AD-1630,

Plaintiff,

vs.

MATTHEW CATE; UNKNOWN
CORRECTIONAL OFFICER #1;
UNKNOWN CORRECTIONAL OFFICER
#2,

Defendants.

Civil No. 11-1130 BTM (BLM)

ORDER:

- (1) GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS*, [ECF No. 3];**
- (2) DISMISSING MONEY DAMAGE CLAIMS AS TO DEFENDANT MATTHEW CATE PURSUANT TO 28 U.S.C. § 1915(e)(2) & 1915A; and**
- (3) DIRECTING U.S. MARSHAL TO EFFECT SERVICE OF COMPLAINT PURSUANT TO FED.R.CIV.P. 4(c)(3) & 28 U.S.C. § 1915(d)**

Michael Bailey (“Plaintiff”), a state prisoner currently incarcerated at California Institution for Men, and proceeding in pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) [ECF No. 3].

I.

MOTION TO PROCEED IFP [ECF No. 3]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2).

10 The Court finds that Plaintiff has no available funds from which to pay filing fees at this
11 time. *See* 28 U.S.C. § 1915(b)(4). Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed
12 IFP [ECF No. 3] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,
13 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk
14 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II.

SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

17 The PLRA also obligates the Court to review complaints filed by all persons proceeding
18 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
19 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
20 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
21 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
22 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
23 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
24 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A.

First, Plaintiff names Matthew Cate as a Defendant but fails to allege any specific factual allegations pertaining to this Defendant in his individual capacity. There is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into causation must be individualized and focus on the duties and

1 responsibilities of each individual defendant whose acts or omissions are alleged to have caused
 2 a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo*
 3 *v. Goode*, 423 U.S. 362, 370-71 (1976)).

4 Supervisory prison officials may only be held liable for the allegedly unconstitutional
 5 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
 6 extent they personally participated in or directed a subordinate’s actions, and (2) in either acting
 7 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff’s
 8 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,
 9 however, Plaintiff’s Complaint fails to set forth facts which might be liberally construed to
 10 support an individualized constitutional claim against Defendant Cate in his individual capacity.
 11 Thus, Plaintiff’s claims for money damages against Cate in his individual capacity are dismissed.
 12 However, Plaintiff’s claim for injunctive relief against Cate survives the sua sponte screening
 13 process and remains in this action.

14 As for the remaining claims against the remaining Defendants, the Court finds Plaintiff’s
 15 allegations sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2)
 16 and 1915A(b).¹ Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his
 17 behalf. See 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3). However, Plaintiff must make an effort
 18 to identify the unnamed Defendants and amend his pleading to substitute their true names.
 19 While the use of “Doe” Defendants is disfavored, the Court will not dismiss Plaintiff’s claims
 20 at this time. See *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (citing *Gillespie*
 21 *v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)) (where identity of alleged defendants will not be
 22 known prior to filing of complaint, plaintiff should be given an opportunity through discovery
 23 and amend his complaint to identify the unknown defendants, unless it is clear that discovery
 24 would not uncover the identities, or that the complaint would be dismissed on other grounds).

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 28 ¹ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

III.

CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 3] is
GRANTED.

6 2. The Secretary of California Department of Corrections and Rehabilitation, or his
7 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
8 owed in this case by collecting monthly payments from the account in an amount equal to twenty
9 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
10 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
11 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
12 ASSIGNED TO THIS ACTION.

13 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
14 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
15 Sacramento, California 95814.

IT IS FURTHER ORDERED that:

17 4. The Clerk shall issue a summons as to Plaintiff's Complaint [ECF No. 1] upon the
18 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each
19 Defendant. In addition, the Clerk shall provide Plaintiff with a copy of this Order and a copy
20 of his Complaint and the summons so that he may serve Defendants. Upon receipt of this "IFP
21 Package," Plaintiff is directed to complete the Form 285s as completely and accurately as
22 possible, and to return them to the United States Marshal according to the instructions provided
23 by the Clerk in the letter accompanying his IFP package. Upon receipt, the U.S. Marshal shall
24 serve a copy of the Complaint and summons upon Defendants as directed by Plaintiff on the
25 USM Form 285s. All costs of service shall be advanced by the United States. *See* 28 U.S.C.
26 § 1915(d); FED.R.CIV.P. 4(c)(3).

27 5. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
28 counsel, upon Defendants' counsel, a copy of every further pleading or other document

1 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
2 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
3 of any document was served on Defendants, or counsel for Defendants, and the date of service.
4 Any paper received by the Court which has not been filed with the Clerk or which fails to
5 include a Certificate of Service will be disregarded.

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7 DATED: July 5, 2011

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Honorable Barry Ted Moskowitz
United States District Judge